No. 80-1631

MAY 27 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

CROCE JACK GIRESI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that firearms silencers seized from his home pursuant to a search warrant should have been suppressed because the warrant did not contain a sufficiently particularized description of certain other property.

1. On July 12, 1978, two firearms silencers were seized from petitioner's home by federal agents executing a warrant authorizing a search for and seizure of contraband firearms, stolen property, United States currency and various documents constituting evidence of illegal firearms transactions and racketeering (Pet. App. 3a-4a). Thereafter, in a four-count indictment filed in the United States District Court for the District of New Jersey, petitioner was charged with possession of unregistered firearms, in violation of 26 U.S.C. 5861(d), and possession of firearms not identified by serial number, in violation of 26 U.S.C. 5861(i). Following the district court's denial of petitioner's motion to suppress the two silencers (488 F. Supp. 445

(1980)), petitioner pleaded guilty to one count of the indictment, reserving (with the government's consent) the right to appeal the denial of his suppression motion. Petitioner was sentenced to a term of 18 months' imprisonment and was fined $1500. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The warrant for the search of petitioner's residence authorized a search for and seizure of the following items:

> Contraband firearms, United States currency, personal telephone and address books, records of financial transactions, personal notebooks, stolen property, and other documents and items which are contraband, fruits, instrumentalities and evidence of a conspiracy (18 U.S.C. 371) to violate the firearms statutes (18 U.S.C. 922-a-1, dealing without a license; 18 U.S.C. appendix 1202-a-1, felony possession); and 26 U.S.C. 5861-d and e, (unregistered firearm); and conspiracy to violate 18 U.S.C. 1962 relating to a racketeering enterprise.

In his suppression motion, petitioner argued, inter alia, that the warrant failed to describe the items to be seized with sufficient particularity to satisfy the requirements of the Fourth Amendment.[1] The district court agreed with petitioner that some of the items to be seized, *i.e.*, "stolen property" and "United States currency," were not adequately described in the warrant, but ruled that other items,

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[1]Petitioner also contended that the supporting affidavit did not supply probable cause to believe that the property sought would be located at petitioner's residence and that, under *Franks* v. *Delaware*, 438 U.S. 154 (1978), he was entitled to an evidentiary hearing on the veracity of certain representations made in the affidavit. Both courts below rejected these contentions (Pet. App. 1a-2a; 488 F. Supp. at 451-455, 461-462), and petitioner does not renew them here.

including the firearms that were the subjects of the indictment, were described in the warrant with the requisite specificity (488 F. Supp. at 455-459). The court then concluded that although the warrant was partially defective, the entire warrant was not invalid as it was possible to sever the defective portions from the sound portions (*id.* at 459-461). The court premised this conclusion on the finding that the warrant "as a whole, [was] not dangerously akin to a general warrant" because the defective portions "did not expand the scope of the search and seizure beyond that already lawfully authorized" by the sufficient portions and because "even the constitutionally deficient descriptions did not authorize a search for evidence of crimes other than those specifically enumerated * * * in the warrant itself" (*id.* at 461). Accordingly, the court refused to suppress the two firearms silencers that were seized pursuant to the clearly sufficient portions of the warrant.

2. Petitioner contends that because some items were insufficiently described in the warrant the entire warrant was tainted, and therefore everything seized in the course of its execution must be suppressed.[2] Petitioner recognizes that the decision below is in accord with the decisions of all of the state courts that have considered this question. In refusing to suppress evidence seized pursuant to a partially defective warrant, the state courts have, in appropriate circumstances, permited the invalid portions of a search warrant to be severed from the valid portions.[3] Petitioner asserts, however, that several federal district courts have refused to adopt this "severability" doctrine, and he urges

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[2]Petitioner concedes (Pet. 5) that the warrant's descriptions of contraband firearms and of books and records constituting evidence of enumerated crimes were sufficiently particular to satisfy the requirements of the Fourth Amendment.

[3]The state court decisions are listed in the district court's opinion (488 F. Supp. at 459-460 & n.17; see Pet. 7-8).

this Court to grant his petition in order to resolve this issue. We submit that the "severability" doctrine as applied by the district court below is in accord with a proper understanding of Fourth Amendment law and that at the present time there is no conflict between federal and state appellate courts on this issue warranting review by this Court.

In *Aday* v. *Superior Court of Alameda County*, 55 Cal. 2d 789, 797, 362 P.2d 47, 52, 13 Cal. Rptr. 415, 420, (1961), the California Supreme Court rejected the argument that a warrant that properly described two obscene books by name but improperly described other items was invalid as a whole. The court pointed out that, to hold otherwise, "would mean that the seizure of certain articles, even though proper if viewed separately, must be condemned merely because the warrant was defective with respect to other articles." *Ibid.* The court concluded that, in the circumstances presented (*ibid.*),

> [t]he invalid portions of the warrant are severable from the authorization relating to the named books, which formed the principal basis of the charge of obscenity. The search for and seizure of these books, if otherwise valid, were not rendered illegal by the defects concerning other articles.

As Professor LaFave has explained, "the *Aday* rule is sound; it would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well." 2 W. LaFave, *Search and Seizure* 111-112 (1978). Moreover, as the district court observed (488 F. Supp. at 460 n.18), many federal courts have permitted severance in the analogous situation where items other than those described in the warrant have been unlawfully seized. See, *e.g.*, *United States* v. *Dunloy*, 584 F. 2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*,

560 F. 2d 1127, 1134 (3d Cir. 1977); *Brooks* v. *United States*, 416 F. 2d 1044, 1050 (5th Cir. 1969), cert. denied, 400 U.S. 840 (1970). Cf. *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976).

Whether the severability doctrine is applicable to a particular search, however, depends upon the facts of the case. If an item seized in plain view in the course of a search under a partially defective warrant would not have been discovered but for the offending language in the warrant, then the seized item should be suppressed as evidence. But this problem is not present where, as here, the seized items have been particularly described in the warrant.

Petitioner relies on two district court cases, *Application of Lafayette Academy, Inc.*, 462 F. Supp. 767 (D. R.I. 1978), aff'd, 610 F. 2d 1 (1st Cir. 1979), and *United States* v. *Burch*, 432 F. Supp. 961 (D. Del. 1977), aff'd mem., 577 F. 2d 729 (3d Cir. 1978), in support of his claim that some federal courts have disagreed with the rule permitting severance. Contrary to petitioner's claim, however, the court in *Lafayette Academy* did not reject the severability doctrine outright, but simply held that severance was inappropriate in the circumstances of that case, as "major drastic corrective surgery" would be required "to cure the constitutional maldadies" from which the warrant in question suffered. 462 F. Supp. at 772. Indeed, in affirming the district court's decision in *Lafayette Academy*, the First Circuit did not reach the severability question because it held that the warrant was defective with respect to all of the items named therein. 610 F. 2d at 6. Here, on the other hand, the district court specifically found that severance was appropriate because the defective portions of the warrant did not expand the scope of the search beyond that authorized by the valid portions of the warrant. 488 F. Supp. at 461.

Admittedly, the district court in *United States* v. *Burch*, *supra*, stated that it was "not persuaded" by the reasoning of

the courts that had adopted the severability doctrine (432 F. Supp. at 964 n.2), and it excluded evidence seized pursuant to a specific provision of a warrant where other provisions of the warrant were not sufficiently particular. In light of the court of appeals' affirmance of the district court's decision in the instant case, however, it appears that the district court decision in *Burch* does not reflect the current state of the law in the Third Circuit.[4] Accordingly, because there is no conflict at present between state and federal appellate courts on the question,[5] the issue does not warrant this Court's review. See generally R. Stern & E. Gressman, *Supreme Court Practice* 278-280 (5th ed. 1978).

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[4]To the extent that the Third Circuit's affirmance of the district court's decision in this case conflicts with its affirmance in *Burch*, that intra-circuit conflict is for the court of appeals to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[5]In *United States* v. *Hatfield*, 461 F. Supp. 57 (E.D. Tenn. 1978), rev'd on other grounds, 599 F. 2d 759 (6th Cir. 1979), the district court suppressed business records and guns that were seized from a gun dealer pursuant to a warrant that it found to be partially invalid (the court determined that the affidavit supporting the warrant justified a search for the records, but not for the guns). Citing *United States* v. *Burch*, *supra*, the court suppressed all of the evidence on the ground that it was "tainted by the overbroad warrant." 461 F. Supp. at 58. On appeal, the Sixth Circuit reversed the district court's holding that the affidavit failed to establish probable cause to search for the guns. The court therefore specifically declined to decide whether the Constitution permits a partially defective warrant to be "severed" in order to uphold a search for items seized under the warrant's valid portions. 599 F. 2d at 762.

It is therefore respectfully submitted that the petition fo a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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